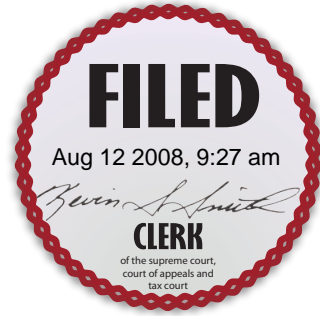


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOHANA MARIE KALINOWICZ,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 45A05-0801-CR-35

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas Stefaniak, Jr., Judge
Cause No. 45G04-0611-FB-118

August 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Johana Marie Kalinowicz appeals her sentence for Class B felony sexual misconduct with a minor. We affirm.

Issue

Kalinowicz raises one issue, which is whether the advisory sentence of ten years was appropriate.

Facts

Kalinowicz was convicted of Class B felony sexual misconduct with a minor. She was thirty years old when she began having an active sexual relationship with M.B., a fourteen-year-old boy. Kalinowicz had known M.B. since he was twelve when he began visiting Kalinowicz in her home to discuss issues he was experiencing due to his parents' divorce. Kalinowicz acted as an informal confidante or counselor and helped M.B. with emotional problems.

The sexual relationship started in December of 2005, and criminal charges were filed against Kalinowicz in November of 2006. The charges consisted of one count of sexual misconduct with a minor as a Class C felony, and one count of sexual misconduct with a minor as a Class B felony. Kalinowicz posted bail, and the relationship continued.

On April 19, 2007, Kalinowicz signed a no-contact order that prohibited her from having any contact with M.B. Kalinowicz was arrested twice¹ for violating her no-contact order, once on June 12, 2007, and again on September 20, 2007. On October 5, 2007, a

¹ On one occasion it was M.B. who initiated the contact.

plea agreement was filed with the trial court. The plea agreement stipulated to the dismissal of sexual misconduct with a minor as a Class C felony if Kalinowicz agreed to plead guilty to the other count of sexual misconduct with a minor as a Class B felony. Both parties were free to fully argue their respective positions as to the sentencing.

At the sentencing hearing the State presented potential aggravators and Kalinowicz presented potential mitigators.² The state asked for a sixteen-year sentence. Kalinowicz asked for a completely suspended sentence, but did not specify a number of years. The trial court found Kalinowicz's previous convictions, her violation of the no contact order, and that prior leniency in the past has not deterred her criminal behavior as aggravators; it found Kalinowicz's guilty plea and her mental health issues as mitigators. After determining the aggravating factors were equal to the mitigating factors, the trial court sentenced Kalinowicz to ten years in the Department of Correction. Kalinowicz now appeals her sentence.

Analysis

² The prosecution listed the following facts as potential aggravators: (1) that Kalinowicz was truant in high school, (2) that she was caught stealing three times from 1994 to 1995, (3) that she had twenty-two infractions from 1995 to 2007, (4) that she had violated her no-contact order twice, (5) that harm was caused to M.B. and his family as a result of Kalinowicz's behavior, and (6) that when the relationship between M.B. and Kalinowicz began, Kalinowicz was in a position of trust and violated that position of trust when he was fourteen years old.

Kalinowicz listed the following facts as potential mitigators: (1) that she had never been arrested for a felony, (2) that it had been several years since her misdemeanor convictions, (3) that she pled guilty, (4) that she sincerely cared for M.B., (5) that she had mental health issues including depression and suicide attempts, (6) that she was remorseful for her actions, and (7) that she had always been gainfully employed.

Indiana Appellate Rule 7(B) provides, “[a]n appellate court may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, the court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Although we do not have to be “very deferential” to the trial court or review sentences with “great restraint,” we must and should exercise deference to a trial court’s sentencing decision because the language in 7(B) requires us to give “due consideration” to that decision, and we understand and recognize the unique perspective a trial court brings to its sentencing decisions. See Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007).

Indiana Code Section 35-50-2-5 provides: “A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years” The burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. See Stewart, 866 N.E.2d at 866.

Kalinowicz does not argue that an abuse of discretion occurred at the trial level, but argues that a mitigated sentence of six years is the appropriate sentence in light of the nature of the offense and her character. We disagree.

We first begin by reviewing the nature of the offense. Kalinowicz was in a position of authority and trust when she began giving guidance to twelve year old M.B. about the problems he was experiencing dealing with his parents’ divorce. After approximately two years, she began an active sexual relationship with this fourteen-year-old boy that lasted more than one-and-a-half years despite efforts, both by M.B.’s parents and law enforcement, to halt the relationship. Kalinowicz was thirty years old at the time the sexual

relationship commenced. She abused her position of trust, took advantage of the boy,³ and knowingly, as evidenced by her violations of the no contact order, broke the law in the process.

We next consider the character of the offender. The record reveals that since childhood, Kalinowicz has had a lack of respect for the authority. She had truancies in high school, and after high school she was arrested and convicted for criminal mischief, conversion, and theft. She was also found guilty for an excessive number of infractions, including repeatedly driving with a suspended license. She has a history of substance abuse, including alcohol, marijuana, cocaine, crack cocaine, and narcotic prescription medication; she also admitted to selling cocaine with her ex-boyfriend. To her credit, she has sought treatment for her substance abuse problems.

Kalinowicz noted she has some mental health issues for which she voluntarily sought treatment, but discontinued the treatment for financial reasons. She attempted suicide on two or three occasions. Kalinowicz argues on appeal that her guilty plea, her mental health issues, and her remorse warrant a lesser sentence. We disagree.

In regard to Kalinowicz's guilty plea, "a defendant who pleads guilty deserves 'some' mitigating weight to be given to the plea in return." Angelmyer v. State, 875 N.E.2d 218, 220 (Ind. 2007). The significance of a guilty plea as a mitigating factor varies from case to case. Id. at 221. Although a guilty plea can demonstrate acceptance of

³ Although we note that M.B. testified he did not see himself as a victim, Kalinowicz must shoulder the responsibility for this crime. M.B. was fourteen years old at the time the sexual relationship began, and was not legally able to consent to a sexual relationship with a thirty year old.

responsibility for a crime and must be considered a mitigating factor, it may not necessarily be a significant mitigating circumstance where the evidence against the defendant is such that the decision to plead guilty is a pragmatic one. Hayes v. State, 879 N.E.2d 1179, 1184 (Ind. Ct. App. 2008), see also Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999).

Here, the evidence against Kalinowicz is substantial. She had sexual intercourse with a fourteen-year-old numerous times. She violated her no contact order. She has a criminal history. She violated a position of trust. To the extent Kalinowicz implies she received no benefit from pleading guilty, we disagree. There were aggravating factors present that allowed the judge to extend her sentence to the State's request of sixteen years, yet she received a ten-year sentence.

Kalinowicz next contends she should receive a sentence less than the advisory term of ten years because she suffers from mental health problems. Again, we disagree. Kalinowicz did not plead guilty but mentally ill. Even if Kalinowicz suffers from mental health issues, we do not find them to be severe enough to warrant a more lenient sentence. A court should carefully consider on the record what mitigating weight, if any, to give any evidence of mental illness. See Smith v. State, 770 N.E.2d 818, 823 (Ind. 2002). There is no obligation to give the evidence the same weight the defendant urges. Id. A court should first evaluate (1) the extent of the defendant's inability to control his or her behavior due to the disorder or impairment; (2) overall limitations on functioning; (3) the duration of the mental illness; and (4) the extent of any nexus between the disorder or impairment and the commission of the crime. Id.

We do not find Kalinowicz's mental health issues are of the magnitude to significantly mitigate her sentence. Even though she suffers from depression and has been suicidal, we do not find those factors to be significant when assessing a person's ability to control his or her behavior. Kalinowicz's overall limitations on functioning were minimal, as evidenced by her gainful employment. In considering the duration of Kalinowicz's mental illness and the extent of any nexus between her illness and the crime she committed, we find no relation between the two. We do not excuse the relationship here, despite the fact that Kalinowicz may have some mental health problems. For the purposes of this case we do not give a great deal of weight to her mental health issues.

Kalinowicz next argues that this court should give significant weight to her expressions of remorse as a mitigating factor. We feel it is best to defer to the trial court on this issue. "Remorse, or lack thereof, by a defendant often is something that is better gauged by a trial judge who views and hears a defendant's apology and demeanor first hand and determines the defendant's credibility." Gibson v. State, 856 N.E.2d 142, 148 (Ind. App. Ct. 2006). We note that someone who has taken advantage of a child should be expected to express remorse, and it is apparent that the trial court did not choose to give a great deal of significance to this factor after observing Kalinowicz first hand and making an assessment of her credibility. The trial court noted that previous leniency in Kalinowicz's sentences did not deter her from breaking the law. We agree with the trial court.

Finally, Kalinowicz argues that her criminal history should not be an aggravating factor. The significance of a criminal history in assessing a defendant's character and appropriate sentence varies based on the nature, gravity, and number of prior offenses in

relation to the current offense. Rutherford v. State, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007). We do not accord significant weight to all of Kalinowicz's criminal history, as most of her convictions are unrelated to the current offense. However, we do give some weight to the fact that she has numerous prior offenses. Also, having a minimal criminal history is not the same as having no criminal history. We accord significant weight to the violation of the no-contact order, which is directly related to the offense herein. We are not convinced that Kalinowicz's sentence was inappropriate.

Conclusion

The sentence was appropriate in light of the nature of the offense and the character of the offender. Kalinowicz had a sexual relationship with a fourteen-year-old boy for more than a year-and-a-half. She abused a position of trust. She has a previous criminal record, including the violation of a no-contact order. The aggravating factors balanced the mitigating factors. Kalinowicz's advisory ten-year sentence was far below the statutory maximum of twenty years for the crime to which she pled guilty. We affirm Kalinowicz's sentence.

Affirmed.

CRONE, J., and BRADFORD, J., concur.